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8  
9 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

10  
11 EDITH MACIAS, individually and on  
behalf of similarly situated individuals;  
12 HOTON DURAN; TIFFANY HUYNH;  
AURA MENDIETA; WILLIAM  
13 LABOY; MIGUEL ACOSTA; CRUZ  
ACOSTA; CUAUHTEMOC TORAL;  
14 and TERESA VILLEGAS, KAPIKA  
SALAMBUE and MARINA DURAN,

15 Plaintiffs,

16 vs.

17 THOMAS J. TOMANEK; and MARK  
18 GARIBALDI, individually and doing  
business as THE GARIBALDI  
19 COMPANY,

20 Defendants.

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22  
23  
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28  
CASE NO. C07 3437 JSW  
NOTICE OF MOTION AND MOTIONS  
BY DEFENDANT MARK GARIBALDI  
INDIVIDUALLY AND dba THE  
GARIBALDI COMPANY:  
1. TO DISMISS RICO CLAIM FOR  
FAILURE TO STATE A CLAIM [FRCP  
12(b)(6)]  
2. TO DISMISS STATE COURT  
CLAIMS FOR LACK OF SUBJECT  
MATTER JURISDICTION [FRCP  
12(b)(1)]  
DATE: January 11, 2008  
TIME: 9:00 a.m.  
COURTROOM: 2, 17<sup>th</sup> Floor  
JUDGE: Hon. Jeffrey S. White

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## **NOTICE OF MOTION**

2 To Plaintiffs EDITH MACIAS, individually and on behalf of similarly situated  
3 individuals; HOTON DURAN; TIFFANY HUYNH; AURA MENDIETA; WILLIAM  
4 LABOY; MIGUEL ACOSTA; CRUZ ACOSTA; CUAUHTEMOC TORAL; and  
5 TERESA VILLEGAS, KAPIKA SALAMBUE and MARINA DURAN ("Plaintiffs") and  
6 their Attorneys of Record:

8 NOTICE IS HEREBY GIVEN that on JANUARY 11, 2008 at 9:00 a.m. or as soon  
9 thereafter as the matter may be heard, in Courtroom 17 of the United States District Court,  
10 Northern District of California, located at 450 Golden Gate Avenue, 16th Floor, San  
11 Francisco, CA 94102, Defendant MARK GARIBALDI, individually and dba THE  
12 GARIBALDI COMPANY (“Garibaldi”) will, and hereby does, move this Court for an  
13 order dismissing the Plaintiffs’ First Amended Class Action Complaint (“FAC”) herein for  
14 failure to state a claim (Rule 12(b)(6)), and lack of subject matter jurisdiction (Rule  
15 12(b)(1)), on the following grounds: Plaintiffs have not pleaded and cannot plead essential  
16 elements of their first claim for relief, for alleged violation of RICO, 18 USC §1962(c); that  
17 claim should therefore be dismissed. The FAC’s remaining seven claims for relief  
18 (violation of California Business and Professions Code §17200, et seq.; violation of  
19 California Civil Code §1950.5; common law fraud; breach of the implied covenant of good  
20 faith and fair dealing; unjust enrichment; defamation; and common law negligence) raise  
21 no federal question. Nor does the FAC allege any basis for diversity jurisdiction.  
22 Therefore, following dismissal of the RICO claim, the remaining state law claims, and thus  
23 the entire action, should be dismissed for lack of subject matter jurisdiction.

25 Defendant Garibaldi's Motion is based on this Notice of Motions, the Memorandum  
26 of Points and Authorities that follows, the papers, records, and file herein, and such other  
27 evidence and argument as the Court may consider.

## MEMORANDUM OF POINTS AND AUTHORITIES

I.

**SUMMARY OF THE CASE AND  
SUMMARY OF RELIEF REQUESTED**

6 Plaintiffs are former tenants of two apartment complexes owned by defendant  
7 Thomas Tomanek and managed by defendant Mark Garibaldi dba The Garibaldi  
8 Company. They allege that defendants induced them to post security deposits ranging from  
9 \$99 to \$1700 by representing that the deposits would be handled in accordance with  
10 California Civil Code §1950.5, then improperly deducted charges for "ordinary wear and  
11 tear" to their apartments.

13 The essence of plaintiffs' claim is that defendants violated the California statute that  
14 delineates a landlord's rights and obligations with respect to security deposits. This is not a  
15 Federal case. It is premised entirely on state law, and it belongs in California state court.  
16 The sole purported basis for federal jurisdiction is the allegation that defendants used the  
17 United States mails in furtherance of their alleged scheme to violate California law, thus  
18 violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"). This is a  
19 classic misuse of the RICO statute. Plaintiffs have not alleged, nor can they allege, facts  
20 sufficient to state a civil RICO claim. Defendant Mark Garibaldi, individually and dba The  
21 Garibaldi Company (collectively "Garibaldi") therefore moves pursuant to Rule 12(b)(6)  
22 for dismissal of plaintiffs' RICO claim. Because there is no other basis alleged for the  
23 exercise of federal jurisdiction, Garibaldi further moves for dismissal of the entire action for  
24 lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

26 | //

1 II.  
2  
3**SUMMARY AND DISCUSSION OF THE ALLEGATIONS OF THE FAC**

4 Plaintiffs are former residents of the Rancho Sol and Rancho Luna apartment  
5 complexes ("the Complexes") in Fremont, California. They bring this suit on their own  
6 behalf. In addition, plaintiff Edith Macias purports to represent a class of tenants who have  
7 resided at the Complexes from June 29, 2003 to the present.

8  
9 This is Plaintiffs' second attempt to plead a RICO claim. Garibaldi moved to  
10 dismiss Plaintiffs' initial Complaint pursuant to Rule 12(b)(6). Rather than oppose the  
11 motion, Plaintiffs filed a First Amended Complaint, recasting the facts alleged in support of  
12 their RICO claim. The differences between the two complaints are addressed briefly  
13 below.

14

15 The FAC names eleven individual plaintiffs, representing eight separate leasehold  
16 interests. Two of these plaintiffs (Salambue and Duran) are new to the FAC. Plaintiffs  
17 allege that they entered into written lease agreements and paid security deposits in the  
18 following amounts (see ¶¶ FAC 17, 22, 27, 32, 37, 43, 48, 54):

19

20 Edith Macias and Hoton Duran	Security Deposit: \$1,700.00
21 Tiffany Huynh	Security Deposit: \$400.00
22 Aura Mendieta	Security Deposit: \$400.00
23 William Laboy	Security Deposit: \$400.00
24 Miguel Acosta and Cruz Acosta	Security Deposit: \$1,150.00
25 Cuauhtemoc Toral and Teresa Villegas	Security Deposit: \$1,100.00
26 Kapika Salambue	Security Deposit: \$500.00
27 Marina Duran	Security Deposit: \$99.00

1 Plaintiffs further allege that they subsequently vacated their apartments, and that  
 2 each "dwelling had been returned to the same condition, except for normal wear and tear,  
 3 and same level of cleanliness as it was at the inception of [the] tenancy." FAC ¶¶ 20, 25, 30,  
 4 35, 40, 46, 51, 57. Finally, plaintiffs allege that defendants "unlawfully, and in bad faith"  
 5 charged various sums to each of them for cleaning and damage, deducting that sum from  
 6 their security deposits (and in some instances requesting further payments and/or referring  
 7 their accounts for collection). *Id.* ¶¶ 21, 26, 31, 36, 41, 47, 52, 58.

8

9 The gravamen of the FAC is that defendants' actions violated California Civil Code  
 10 §1950.5, which governs a landlord's handling and disposition of security deposits. Through  
 11 creative pleading, plaintiffs have expanded their suit to allege eight separate claims for  
 12 relief, labeled with the letters A through H, as follows:

13

14	A (1st)	RICO [18 USC 1961, et seq.]
15	B (2nd)	California Unfair Business Practices [B&P Code § 17200, et seq.]
16	C (3rd)	Cal. Civil Code § 1950.5
17	D (4th)	Fraud
18	E (5th)	Breach of Implied Covenant of Good Faith & Fair Dealing
19	F (6th)	Unjust Enrichment
20	G (7th)	Defamation
21	H (8th)	Negligence

22

23 Plaintiffs plead in the alternative, stating that defendants' alleged failure to handle  
 24 their security deposits properly was either a conspiracy to defraud plaintiffs, or inadvertent  
 25 and merely negligent.

26

27 The only claim raising a federal question is the RICO claim. The remaining seven  
 28

1 claims arise from state law, and the FAC alleges no basis for diversity jurisdiction.  
2 On the whole, the factual allegations of the FAC are spare and legally conclusory.  
3 Plaintiffs have already amended those allegations once in an attempt to avoid dismissal;  
4 there is no indication they can plead facts that would magically transform this garden  
5 variety landlord-tenant dispute into a federal RICO action.

6

III

## PLAINTIFFS' RICO CLAIM SHOULD BE DISMISSED

9

10 To state a claim for violation of RICO under 18 U.S.C. 1962(c), plaintiffs must  
11 allege (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.  
12 *Miller v. Yokohama Tire Corp.*, 358 F.3d 620 (9th Cir. 2004). In addition, to recover civil  
13 RICO damages, plaintiffs must establish proximate cause - that there exists a "direct  
14 relation between the injury asserted and the injurious conduct alleged." *Holmes v.*  
15 *Securities Investor Protection Corp.*, 503 U.S. 258, 266 (1992).

16

17 Here, plaintiffs attempt to satisfy these requirements by alleging that defendant  
18 Garibaldi conducted an "enterprise" - defendant Tomanek - which engaged in "racketeering  
19 activity" - instances of mail fraud - as part of a scheme to wrongfully withhold tenants'  
20 security deposits. FAC ¶¶ 68-70.<sup>1</sup> As "racketeering activity" plaintiffs allege four predicate  
21 acts of mail fraud, consisting of the mailing of statements to plaintiffs Macias, Mendieta,  
22 Huynh, and a mysterious third party who is not named as a plaintiff and is identified only as  
23 "Nestor C.-H." *Id.* ¶ 71(b), (e), (g), & (h). The purported instances of mail fraud are all

24

25       <sup>1</sup> The Complaint does not name Tomanek as a RICO defendant. This omission appears to  
26 be a deliberate effort to plead around the requirement that the RICO defendant be separate and  
27 distinct from the RICO "enterprise." *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158,  
161 (2001) ("[T]o establish liability under §1962(c) one must allege and prove the existence of two  
distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred  
to by a different name.").

1 alleged to have occurred over a single three month, four day span, from August 9, 2005 to  
 2 November 13, 2005. *Id.* The FAC does not allege that any plaintiff detrimentally relied on  
 3 any of these mailings or that the mailings directly caused plaintiffs any harm at all. *See id.*

4

5 In their initial Complaint, plaintiffs linked Garibaldi's allegedly false representations  
 6 directly to its use of the U.S. Mails. Specifically, plaintiffs alleged that Garibaldi committed  
 7 fraud by mailing closing statements to the plaintiffs "unlawfully misrepresenting amounts  
 8 due and owing . . ." Complaint ¶13. In its first motion to dismiss, Garibaldi pointed out  
 9 that for various reasons, the allegedly false representations were not actionable. In  
 10 response, plaintiffs completely abandoned their initial theory, adopting a new approach  
 11 which de-links Garibaldi's alleged misrepresentations from its use of the U.S. Mails. Now,  
 12 plaintiffs allege that Garibaldi made material misrepresentations years earlier, at the time  
 13 the parties entered into their respective lease agreements. Specifically, for each plaintiff,  
 14 the FAC now makes the following allegation: "Under the terms of the agreement, The  
 15 Garibaldi Company agreed to return [tenant's] security deposit by mail within three weeks  
 16 of the tenants' vacating the unit, less any charges for damage to the premises, fixtures or  
 17 furnishings, but not including charges for reasonable wear and tear." *See* FAC ¶¶17, 22, 27,  
 18 32, 37, 43, 48, 54. Plaintiffs then allege that, in entering into a lease and paying a security  
 19 deposit, each of them relied on this representation. *Id.* ¶¶18, 23, 28, 33, 38, 44, 49, 55.  
 20 Finally, plaintiffs allege that four separate mailings of closing statements pursuant to Civil  
 21 Code §1950.5(g) were made "in furtherance" of a scheme to defraud. *Id.* ¶71(b), (e), (g), &  
 22 (h)

23

24 Plaintiffs have failed in their attempt to save their purported RICO claim by  
 25 pleading a new theory; their claim still suffers at least three fatal deficiencies. First,  
 26 plaintiffs have failed to plead facts showing that Garibaldi's use of the mails was "in  
 27 furtherance" of a scheme to defraud. Second, because the alleged instances of mail fraud

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1 all occurred within, at most, a four month period, plaintiffs' allegations do not satisfy  
 2 RICO's continuity requirement and thus fail to establish a "pattern" of racketeering activity.  
 3 Finally, plaintiffs cannot establish "RICO injury" - that the alleged instances of mail fraud  
 4 (mailing of the statements itemizing disposition of their security deposits) proximately  
 5 caused their claimed damages.

6

7 **A. Plaintiffs' Allegations Of Mail Fraud Are Fatally Deficient**

8

9 To establish RICO liability, plaintiffs must plead at least two statutorily enumerated  
 10 "predicate acts." *See H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237-38  
 11 (1989) (pleading of two predicate acts necessary, but not sufficient, to establish a pattern of  
 12 racketeering activity). The only predicate acts alleged in support of the RICO claim are  
 13 four alleged instances of mail fraud, in violation of 18 USC §1341. Specifically, the FAC  
 14 alleges that Garibaldi committed mail fraud by mailing four closing statements pursuant to  
 15 California Civil Code §1950.5(g) detailing the cleaning and repair work performed by the  
 16 landlord, the amounts paid for that work, and the net refund or balance due after applying  
 17 the security deposit. See FAC, ¶71(b), (e), (g), & (h). These allegations are insufficient to  
 18 establish mail fraud.

19

20 As Judge Illston recently explained in dismissing a RICO claim predicated on  
 21 alleged instances of mail fraud,

22

23 To demonstrate the predicate acts of mail and wire fraud, plaintiffs must  
 24 show a scheme to defraud, involving use of United States wires or mail, with  
 25 the specific intent to defraud. Mail or wire fraud includes any scheme to  
 26 deprive another of money or property by means of false or fraudulent  
 27 pretenses, representations, or promises. "The elements of mail fraud are that  
 28 (1) the Defendant made up a scheme or plan for obtaining money or  
 property by making false statements; (2) the Defendant knew the statements  
 were false; (3) the statements were of a kind that would reasonably influence  
 a person to part with the money or property; (4) the Defendant acted with  
 the intent to defraud; and (5) the Defendant used, or caused to be used, the

1 mails to carry out the scheme."

2 *Menjivar v. Trophy Properties IV DE, LLC*, 2006 WL 2884396, at 4 (N.D. Cal. Oct.  
 3 10, 2006) (quoting *United States v. Marconi*, 899 F. Supp. 458, 461 (C.D. Cal. 1995))  
 4 (internal quotations and citations omitted); *see also Miller*, 358 F.3d at 620 ("To allege a  
 5 violation of mail fraud under §1341, 'it is necessary to show that (1) the defendants formed  
 6 a scheme or artifice to defraud; (2) the defendants used the United States mails or caused  
 7 a use of the United States mails in furtherance of the scheme; and (3) the defendants did  
 8 so with the specific intent to deceive or defraud.") (quoting *Schreiber Distrib. Co. v.*  
 9 *Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1400 (9th Cir.1986)).

10

11 Here, plaintiffs' mail fraud allegations suffer two elemental flaws. First, the facts as  
 12 alleged in the FAC establish that Garibaldi's use of the mails was not in *furtherance* of the  
 13 alleged scheme to defraud - it was in *contravention* of it. Civil Code §1950.5(g)(1) requires  
 14 that the landlord provide the tenant "an itemized statement indicating the basis for, and the  
 15 amount of, any security received and the disposition of the security . . ." The statements  
 16 that Garibaldi mailed accurately stated the disposition of the tenants' security and thus  
 17 carried out the statutory purpose of providing the requisite written notice. By definition,  
 18 these statutorily required notices - which are not now alleged to have been inaccurate in  
 19 any respect - could *not* have been meant to "trick" plaintiffs, but rather can only be seen as  
 20 having been merely "confirmatory in nature," in that they accurately confirmed what  
 21 amount of money Garibaldi was in fact refunding or charging. *Garrick-Aug Associates*  
 22 *Store Leasing, Inc. v. Hirschfeld*, 652 F.Supp. 905, 906 (S.D.N.Y. 1986). *See also Miller*,  
 23 358 F.3d at 621-22 (dismissing RICO claim predicated on mail fraud where nature of  
 24 statements were such that defendants could not reasonably have expected plaintiff to rely  
 25 on them). In other words, the statements mailed by Garibaldi were "simply notifications" of  
 26 the result of the alleged scheme. Instead of furthering a clandestine fraud, they were  
 27 "disclosure documents which would tend to put [plaintiffs] on notice of the alleged scheme,  
 28

1 rather than to conceal it." *Garrick-Aug*, 652 F. Supp. at 906-907.

2  
 3 Where, as here, "mailings relied upon by the plaintiffs to establish the predicate acts  
 4 under RICO are not in furtherance of the alleged scheme to defraud, the RICO claims  
 5 must be dismissed." *Id.* at 907.

6  
 7 Second, because the statements related to plaintiffs' own conduct - in particular,  
 8 whether plaintiffs had damaged their apartments beyond normal wear and tear - Garibaldi  
 9 literally could not have intended that plaintiffs be deceived by them.

10  
 11 In *Sosa v. DIRECTV*, 437 F.3d 923 (9th Cir. 2006), the Ninth Circuit recently  
 12 confronted directly analogous facts. Defendant DIRECTV mailed plaintiff Sosa a letter  
 13 asserting that Sosa had obtained unauthorized access to DIRECTV's satellite signal and  
 14 programming. Sosa brought a RICO claim, alleging that the assertion of unauthorized  
 15 access was false and that DIRECTV's mailing of the letter thus constituted mail fraud. The  
 16 Court rejected Sosa's argument:

17  
 18 Sosa further contends that DIRECTV's assertion that it had documents  
 19 showing that he had 'purchased . . . signal theft equipment to gain  
 20 unauthorized access to DIRECTV's programming' and its other allegations  
 21 concerning Sosa's unauthorized access to its signal were false and amounted  
 22 to a scheme or artifice to defraud. He argues that as a result of these  
 23 statements, he was induced to settle with DIRECTV. As in *Pendergraft*,  
 24 DIRECTV's statements asserting that Sosa had modified smart cards and  
 25 used smart card programming equipment to access its signal without paying  
 for it cannot constitute mail or wire fraud. Because these statements  
 concerned Sosa's own conduct, DIRECTV could not have intended that he  
 would be deceived by them and was therefore necessarily lacking in the intent  
 requisite to have committed mail or wire fraud."  
*Sosa*, 437 F.3d at 941 (emphasis added) (citing *U.S. v. Pendergraft*, 297 F.3d  
 1198, 1209 (11th Cir. 2002)).

26 Likewise, because the statements mailed by Garibaldi concerned plaintiffs' own  
 27 conduct, Garibaldi could not have intended that plaintiffs would be deceived by them and

1 the intent required to commit mail fraud is therefore necessarily lacking.

2

3 **B. Plaintiffs' Allegations Do Not Satisfy RICO's "Continuity" Requirement**

4

5 RICO requires that plaintiffs plead a "pattern" of racketeering activity. Under  
 6 Supreme Court authority, a pattern consists of at least two related predicate acts that  
 7 amount to or pose a threat of continuing activity. *H.J., Inc. v. Northwestern Bell*  
 8 *Telephone Co.*, 492 U.S. 229, 239 (1989). The rule that the pattern amount to or pose a  
 9 threat of continuing activity is known as the "continuity" requirement. *Id.* at 240.

10

11 A plaintiff may meet this requirement by pleading either closed or open-ended  
 12 continuity. *Id.* at 241. Closed-ended continuity may be demonstrated through proof of a  
 13 series of related predicates extending over a substantial period of time. A "substantial  
 14 period" means just that: "Predicate acts extending over a few weeks or months and  
 15 threatening no future criminal conduct do not satisfy this requirement." *H.J., Inc.*, 492 U.S.  
 16 at 242; *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992) ("A pattern of  
 17 activity lasting only a few months does not reflect the "long term criminal conduct" to which  
 18 RICO was intended to apply."). Alternatively, plaintiff may establish open-ended  
 19 continuity by showing that there exists a threat of ongoing criminal activity. *H.J., Inc.*, 492  
 20 U.S. at 242. *Howard v. America Online, Inc.*, 208 F.3d 731, 750 (9th Cir. 2000).

21

22 Here, plaintiffs' allegations establish neither type of continuity. The predicate acts  
 23 they have pleaded extended over only a three-month, four-day period.<sup>2</sup> This is manifestly  
 24 insufficient to establish close-ended continuity. *See Religious Tech. Ctr. v. Wollersheim*,  
 25 971 F.2d at 366-67 (9th Cir. 1992) ("We have found no case in which a court has held the

26

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27 <sup>2</sup> Indeed, putting aside the allegations relating to the mysterious non-plaintiff "Nestor  
 28 C.-H.," the predicate acts extend only from October 10, 2005 to November 13, 2005 - a mere 34  
 days.

1 requirement to be satisfied by a pattern of activity lasting less than a year."). Further, the  
 2 last such act is alleged to have occurred nearly two years ago, on November 13, 2005, and  
 3 there are absolutely no *facts* pleaded that would indicate a threat of ongoing criminal  
 4 activity sufficient to establish open-ended continuity. *See Howard*, 208 F.3d at 750-51  
 5 (mere allegation that activities were a "regular way of doing business" not sufficient to  
 6 withstand motion to dismiss). Plaintiffs have therefore failed to allege an actionable  
 7 "pattern" of racketeering activity.

8

9 **C. Plaintiffs Cannot Establish Proximate Cause**

10

11 "It is well settled that, to maintain a civil RICO claim predicated on mail fraud, a  
 12 plaintiff must show that the defendants' alleged misconduct proximately caused the injury."  
 13 *Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004); *accord Anza v. Ideal Steel*  
 14 *Supply Corp.*, 126 S. Ct. 1991, 1998 (2006). This requirement is generally interpreted to  
 15 require that plaintiff plead reliance - i.e., that he or she detrimentally relied on the  
 16 statements allegedly constituting mail fraud. *Poulos*, 379 F.3d at 664-65 ("[R]eliance may  
 17 be 'a milepost on the road to causation.' This case fits that description to a tee.") (quoting  
 18 *Blackie v. Barrack*, 524 F.2d 891, 906 n. 22 (9th Cir.1975)).<sup>3</sup>

19

20

---

21 <sup>3</sup> The majority of circuits to have addressed the issue have held that to establish proximate  
 22 cause, the plaintiff must allege detrimental reliance. For instance, in the Fourth Circuit, "To  
 23 recover civil RICO damages . . . an individual must also allege that he was injured 'by reason of the  
 24 pattern of racketeering activity. To meet this burden with respect to mail fraud and wire fraud, a  
 25 plaintiff must 'plausibly allege both that [he] detrimentally relied in some way on the fraudulent  
 26 mailing [or wire] . . . and that the mailing [or wire] was a proximate cause of the alleged injury to [his]  
 27 business or property.'" *American Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 233  
 (4th Cir. 2004) (quoting *Chisolm v. Transouth Financial Corp.*, 95 F.3d 331, 337 (4th Cir. 1996);  
 internal citations omitted). Both the United States Supreme Court and the Ninth Circuit have  
 declined to reach this issue. *See Anza*, 126 S. Ct. at 1998 ("Because Ideal has not satisfied the  
 proximate-cause requirement articulated in *Holmes*, we have no occasion to address the substantial  
 question whether a showing of reliance is required."); *Poulos*, 379 F.3d at 666 ("Because it is neither  
 necessary nor prudent to reach the issue of whether reliance is the only way plaintiffs can establish  
 causation in a civil RICO claim predicated on mail fraud, we decline to do so.").

28

1       Here, plaintiffs have utterly failed to plead - through reliance or otherwise - that  
 2 their injuries were proximately caused by their reliance on any statement communicated  
 3 through the U.S. Mails.<sup>4</sup> In particular, plaintiffs do not plead that they were 'induced' to  
 4 part with any money because of the statements that Garibaldi mailed or that their receipt of  
 5 these statements otherwise directly caused them harm. Rather, what they have pleaded is  
 6 simply that defendants provided them with written notices, after the fact, stating that  
 7 certain charges had been imposed. Far from being made in furtherance of a scheme to  
 8 defraud, these mailings were statutorily required for the purpose of placing plaintiffs on  
 9 notice of the disposition of their security deposits. Under plaintiffs' far-fetched theory,  
 10 compliance with the requirements of Civil Code §1950.5(g)(1) turns every California  
 11 landlord into a potential RICO defendant. This approach turns logic, and the law, on its  
 12 head.

13

14 **D. The RICO Claim Should Be Dismissed Without Leave To Amend**

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16       The facts pleaded simply do not constitute a RICO violation. The simple fact is that  
 17 Garibaldi's compliance with the statutory requirement that tenants be provided an itemized  
 18 disposition of their security deposits cannot form the basis for a "pattern" of predicate acts  
 19 of mail fraud. If indeed there was anything wrong with how Garibaldi handled the security  
 20 deposits - a claim Garibaldi flatly denies - California law would provide sufficient remedies,  
 21 without the need for resort to a federal RICO claim. Plaintiffs have now had two bites at  
 22 the apple, and their second effort is, if anything, more flawed than the first. The defects in  
 23 the pleading detailed herein are fundamental, and cannot be cured by pleading any  
 24 additional facts, therefore dismissal of the RICO claim without leave to amend is  
 25 appropriate. *Lopez v. Smith*, 203 F.3d 112, 1130 (9th Cir. 2000).

26

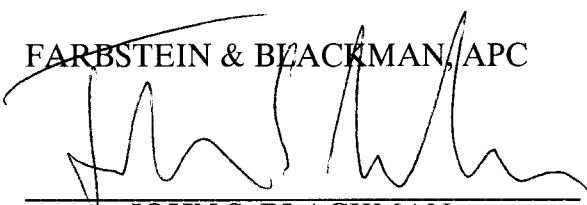
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27       <sup>4</sup> As noted earlier, plaintiffs do allege that they detrimentally relied on representations  
 28 made in the lease agreements; however, they are unable to link their reliance to the alleged  
 instances of mail fraud.

## 1 IV.

2 **THE REMAINDER OF THE ACTION SHOULD BE DISMISSED,**  
3 **FOR LACK OF SUBJECT MATTER JURISDICTION**4 Absent the RICO claim, there is no independent basis for the exercise of federal  
5 jurisdiction. Accordingly, Garibaldi respectfully requests dismissal of plaintiffs'  
6 supplemental state law claims pursuant to 28 U.S.C. §1367(c)(3).

## 7 V.

8 **CONCLUSION**  
910  
11 The deficiencies in plaintiffs' RICO claim are not mere pleading mistakes, easily  
12 corrected through amendment. Rather, they reflect a fundamental problem: This is a state  
13 law case, a dispute between landlord and tenants, founded on alleged violations of  
14 California Civil Code §1950.5. The relevant facts simply cannot be squeezed into the  
15 framework of a federal RICO claim. Plaintiffs' state law remedies are more than adequate.  
16 See Cal. Civ. Code §1950.5(l) (allowing imposition of a penalty of up to twice the amount  
17 of tenant's deposit, plus actual damages). Garibaldi respectfully requests that this motion  
18 be granted, and that the First Amended Complaint be dismissed without leave to amend.19  
20 Respectfully submitted,21  
22 DATED: October 18, 200723  
24   
FARBSTEIN & BLACKMAN, APC  
JOHN S. BLACKMAN  
Attorneys for Mark Garibaldi and  
The Garibaldi Company25  
26  
27  
28

1 **PROOF OF SERVICE**2 Macias v. Tomanek, , Mark Garibaldi, The Garibaldi Company  
USDC, Northern California, Case No. C 07-3437 JSW3 I am a resident of the State of California, over the age of eighteen years, and not a party  
4 to the within action. I am employed in the office of a member of the bar of this court at whose  
direction the service was made. My business address is 411 Borel Avenue, Suite 425, San  
5 Mateo, California 94402-3518. My electronic notification address is stf@farbstein.com. On  
October 18, 2007, I served the following document(s):6 **MOTION TO DISMISS [RULE 12(b)(6) and 12(b)(1)] BY DEFENDANTS  
GARIBALDI AND THE GARIBALDI COMPANY**

7 on the following person(s) by the method(s) indicated below:

9 Elizabeth Noonan Brancart, Esq. Christopher A. Brancart, Esq. Brancart & Brancart P. O. Box 686 Pescadero, CA 94060	10 Attorneys for plaintiffs Tel: 650-879-0141 Fax: 650-879-1103 email: <u>cbrancart@brancart.com</u> <u>ebrancart@brancart.com</u>
11 Sara B. Allman, Esq. Allman & Nielsen 100 Larkspur Lndg Cir #212 Larkspur, CA 94939	12 Attorneys for defendant Thomas J. Tomanek Tel: 415-461-2700 Fax: 1-415-461-2726 <u>all-niel@pacbell.net</u>

14 [ ] by transmitting via facsimile on this date from fax number (650) 554-6240 the  
15 document(s) listed above to the fax number(s) set forth herein. The transmission was  
16 completed before 5:00 p.m. and was reported complete and without error. The  
17 transmission report is attached to this proof of service. Service by fax was made by  
agreement of the parties confirmed in writing.18 [X] by placing the document(s) listed above in a sealed envelope(s) with postage thereon  
19 fully prepaid, for deposit in the United States mail at San Mateo, California addressed  
20 as set forth herein. I am readily familiar with the firm's practice of collection and  
processing correspondence for mailing. Under that practice it would be deposited with  
the U.S. Postal Service on that same day, with postage thereon fully prepaid in the  
21 ordinary course of business.22 [X] by transmitting the document(s) listed above via the Court's ECF system to the persons  
23 at the email address(es) set forth herein. The transmission was completed before 5:00  
p.m. and was reported complete and without error.24 I declare under penalty of perjury under the laws of the United States and the State of  
25 California that the above is true and correct. Executed at San Mateo, California, on October  
26 18, 2007.27   
28 SUZANNE T. FARBSTEIN